Abdul Ghani Haroon v Ketua Polis Negara and another application (No 4)

HIGH COURT (SHAH ALAM) — CRIMINAL APPLICATIONS NO 44–9 OF 2001 AND 44–10 OF 2001
MOHD HISHAMUDIN J
30 MAY 2001

Criminal Procedure *— Habeas corpus — Rearrest after release of detainee — Whether court should restrain police from rearresting within 24 hours after release — Federal Consititution art 5*

Abdul Ghani bin Haroon and Gobalakrishnan a/l Nagappan were members of the political party, Parti Keadilan Nasional. They had been separately arrested under s 73(1) of the Internal Security Act 1960. The families, on behalf of the two detainees, have separately applied to court for a writ of habeas corpus, and by consent, these two applications have been consolidated and were being heard together. The common respondent in the applications was the Inspector General of Police. The court granted the applications of the applicants for a writ of habeas corpus to be issued. The applicants applied for an order that the police be restrained from rearresting within a period of at least 24 hours from the time of the formal order for their release.

Held, allowing the application:

(1) In accordance with the provision of cl 2 of art 2 of the Federal Constitution ('the Constitution'), the court ordered that both the applicants be produced before the court at 3.30pm on the same day for a formal order that they be released. At 3.30pm, when the applicants were produced before the court, upon the application of the learned counsel for the applicants and after hearing arguments from both sides, apart from formally ordering their release, the court also made a further order that the police be restrained from rearresting the applicants within the next 24 hours (see p 201A–C).

(2) In view of the absence of the assurance (that there would not be any immediate rearrest) by the senior federal counsel, the court did not rule out the possibility of immediate rearrest in view of the heavy presence of police personnel. Should rearrest immediately occur, that would have been a grave injustice, for such an action on the part of the police would make a mockery not only of the judgment of the court, which was delivered in the morning but also of the whole habeas corpus proceeding and of the constitutional guarantees under art 5 of the Constitution. The court thus has the power to make the order asked for, particularly in view of the words 'or any others, for the enforcement of the rights conferred by Part II of the Constitution …' and that it would have failed in its duty to uphold the law and the

Constitution if it were to decline to grant the order asked for (see pp 201H–202A).

[**Bahasa Malaysia summary**

Abdul Ghani bin Haroon dan Gobalakrishnan a/l Nagappan adalah ahli-ahli parti politik, Parti Keadilan Nasional. Mereka telah ditangkap secara berasingan di bawah s 73(1) Akta Keselamatan Dalam Negeri 1960. Keluarga mereka, bagi pihak mereka berdua yang ditahan, telah secara berasingan memohon kepada mahkamah untuk satu writ habeas corpus, dan melalui kebenaran, kedua-dua permohonan ini telah disatukan dan didengar bersama. Responden di dalam permohonan ini adalah Ketua Polis Negara. Mahkamah membenarkan permohonan-permohonan pemohon-pemohon untuk satu writ habeas corpus dikeluarkan. Pemohon-pemohon telah memohon untuk satu perintah agar polis dihalang daripada membuat tangkapan semula dalam tempoh sekurang-kurangnya 24 jam dari masa perintah rasmi pembebasan mereka.

Diputuskan, membenarkan permohonan tersebut:

(1) Menurut peruntukan kl 2 perkara 2 Perlembagaan Persekutuan ('Perlembagaan'), mahkamah memerintahkan bahawa kedua-dua pemohon dihadapkan ke mahkamah pada pukul 3.30pm pada hari yang sama untuk satu perintah rasmi agar mereka dibebaskan. Pada pukul 3.30pm, apabila pemohon-pemohon dihadapkan ke mahkamah, berdasarkan permohonan peguam bagi pihak pemohon-pemohon, dan setelah mendengar hujah-hujah daripada kedua-dua belah pihak, selain daripada secara rasmi memerintahkan pembebasan mereka, mahkamah juga membuat satu perintah berikutnya bahawa polis dihalang daripada membuat tangkapan semula ke atas pemohon-pemohoan dalam tempoh 24 jam berikutnya (lihat ms 201A–C).

(2) Berdasarkan ketiadaan apa-apa jaminan (bahawa tidak akan ada tangkapan semula) oleh peguam persekutuan, mahkamah tidak mengenepikan kemungkinan tangkapan semula serta-merta berdasarkan kehadiran anggota polis yang ramai. Sekiranya tangkapan semula berlaku, ia adalah satu ketidakadilan yang ketara. Untuk satu tindakan sedemikian berlaku dari pihak polis adalah satu sindiran bukan sahaja kepada penghakiman mahkamah, yang telah diputuskan pagi tersebut tetapi juga kepada keseluruhan prosiding habeas corpus dan jaminan perlembagaan di bawah perkara 5 Perlembagaan. Maka mahkamah mempunyai kuasa untuk membuat perintah yang dipohon, terutamanya berdasarkan perkataan-perkataan 'atau yang lain, untuk penguatkuasaan hak-hak yang diberikan oleh Bahagian II Perlembagaan …' dan bahawa ia akan gagal dalam kewajipannya untuk menegakkan undang-undang dan

Perlembagaan jika ia enggan untuk membenarkan perintah yang dipohon (lihat ms 201H–202A).]

Notes

For cases on habeas corpus generally, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1505–1572.

Cases referred to

Abdul Ghani Haroon v Ketua Polis Negara and another application (No 3) [2001] 2 MLJ 689 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 25(2)
Federal Constitution arts 2(2), 5
Government Proceeding Act 1956 s 29
Human Rights Commission of Malaysia Act 1999 s 4 (2)(d)
Internal Security Act 1960 s 73(1)

R Sivarasa (*Malik Imtiaz Sarwar*, *Kamarul Hisham*, *Kandasamy Palaniandy*, *M Moganambal*, *Saiful Izham* and *Hamidzun Khairuddin* with him) (*Selvam Shanmugam & Partners*) for the applicants.

Abdul Wahab bin Mohd and *Abdul Rashid Sudin* (Senior Federal Counsels) for the respondent.

Mohd Hishamudin J:. (On the oral application by the applicants of 3.30pm for an order that the police be restrained from rearresting within a period of at least 24 hours with effect from 4pm, 30 May 2001)

En Abdul Ghani bin Haroon and Mr Gobalakrishnan a/l Nagappan are members of the political party, Parti Keadilan Nasional. They had been separately arrested under s 73(1) of the Internal Security Act 1960 ('the Act'). Mr Gobalakrishnan was arrested on 10 April 2001 at Kuah Police Station, Langkawi, whilst En Abdul Ghani was arrested on 11 April 2001 at Kuching International Airport.

The families, on behalf of the two detainees, have separately applied to this court for a writ of habeas corpus, through Criminal Application No 44–9–2001 and Criminal Application No 44–10–2001. By consent, these two applications have been consolidated and are being heard together.

The common respondent in the applications is the Inspector General of Police.

From the day of arrest right until the last day of the hearing of this application (Tuesday, 22 May 2001), the family members and the lawyers engaged by their respective families have been denied access by the police department, and so has the Human Rights Commission ('SUHAKAM'), notwithstanding the clear provisions of the Human Rights Commission of Malaysia Act 1999, in particularly, s 4(2)(d) of the Act.

On 30 May 2001, I delivered my judgment. The full written judgment (it has now been reported as *Abdul Ghani Haroon v Ketua Polis Negara and another application (No 3)* [2001] 2 MLJ 689) was read in open court around 11am. I granted the applications of the applicants for a writ of habeas corpus to be issued. In accordance with the provision of cl 2 of art 2 of the Federal Constitution ('the Constitution'), I ordered that both the applicants be produced before me at 3.30pm on the same day for a formal order that they be released. At 3.30pm when the applicants were produced before the court, upon the application of the learned counsel for the applicants, En Malik Imtiaz, and after hearing arguments from both sides, apart from formally ordering their release, I also made a further order that the police be restrained from rearresting the applicants within the next 24 hours.

As pointed out by En Malik — and this was not rebutted by En Abdul Rashid Sudin, senior federal counsel — and based on my own personal observation, there was tremendous police presence around the court premises that afternoon. En Malik submitted that the applicants feared that they would immediately be rearrested once they leave the courtroom. Learned counsel urged me to exercise my inherent powers — which I take to mean s 25(2) of the Courts of Judicature Act 1964 read with para 1 of the Schedule of the same Act — to make a further order that the police be restrained from rearresting the applicants at least for a period of 24 hours. The purpose of the order, argued counsel, is not only to give fruits to my judgment earlier in the morning but also on humanitarian grounds since the families of the applicants were then still outstation and were on their way from Penang and Kedah to Shah Alam to meet the applicants.

The learned senior federal counsel, En Abdul Rashid Sudin, contrary to my expectation, did not assure the court that the applicants had nothing to worry and that what they feared would happen to them would not happen. Instead, En Rashid submitted that I had no power to grant the order prayed for citing s 29 of the Government Proceeding Act 1956.

Subsection (2) of s 25 of the Courts of Judicature Act 1964 reads:

> (2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule:
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> Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same.

Paragraph 1 of the Schedule provides:

> Prerogative writs
>
> Power to issue to any person or authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose.

In my judgment, in view of the absence of the assurance (that there would not be any immediate rearrest) by senior federal counsel, I did not rule out the possibility of immediate rearrest in view of the heavy presence of police personnel. I am of the view that, should rearrest immediately occur, that

would have been a grave injustice. For such an action on the part of the police would make a mockery not only of my judgment which I had delivered in the morning but also of the whole habeas corpus proceeding and of the constitutional guarantees under art 5 of the Constitution. I am of the view that I have the power to make the order asked for, particularly in view of the words '*or any others, for the enforcement of the rights conferred by Part II of the Constitution* …' and that I would have failed in my duty to uphold the law and the Constitution if I were to decline to grant the order asked for.

Perhaps I should add that it is also my view that even if I were not to grant the order asked for that afternoon, it would, nevertheless, be a contempt of court on the part of the police to rearrest the applicants based on the reasons for the original arrest, which arrest and detention the court earlier in the morning had ruled unlawful and mala fide.

Application allowed.

Reported by Wong Ee Lynn